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No. 81-2359

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,
Petitioners,

—against—

PHONETELE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' RESPONSE TO THE AMICUS BRIEF OF THE UNITED STATES

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The United States contends in its brief *amicus curiae* ("DOJ Br.") that the decision of the court below is correct because implied antitrust immunity "may be found only where the regulatory statute, or the regulatory agency, requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws." DOJ Br. 8. The test advocated by the Justice Department directly conflicts with the controlling decisions of this Court, which have found implied immunity for conduct that has neither been compelled nor approved by statute or by regulatory agencies. *See* Petition 17-18, 21. Indeed, those cases rejected the very test that the Department advances here.

Furthermore, the Department's brief is largely devoted to addressing a question that is not presented by the petition. Petitioners are not claiming "blanket antitrust immunity" for their conduct "merely because [they are] subject to federal regulation." DOJ Br. 3-5, 10. Rather, petitioners' sole contention is

that the specific interconnection conduct at issue here is impliedly immune from antitrust attack because it is subject to pervasive public utility regulation under a public interest standard that is inconsistent with the competition standard of the antitrust laws.

The Department also misstates the relevant regulatory history. *Compare* DOJ Br. 8-10 *with* Petition 5-13. For example, the Government asserts that the FCC found that the post-*Carterfone* tariffs at issue in this case violated the Communications Act during the period that they were in effect and that there was no need for connecting arrangements to protect the network from harm. DOJ Br. 8-10. However, the very decision which the Government asserts "warned" petitioners that their post-*Carterfone* tariffs had not received FCC approval expressly held that the tariffs "[are] not in conflict with our *Carterfone* ruling." *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871, 872 (1969). And during the subsequent six year period in which the FCC considered whether it could safely allow the interconnection of customer-owned terminal equipment under any other circumstances, it repeatedly stated that petitioners' tariffs fully complied with its prior rulings.[1] In 1975, when the FCC established a registration program to protect the network and held that equipment satisfying the requirements of the program could be connected directly to the network, it therefore held only that the tariffs' requirement was "unnecessarily restrictive" prospectively,

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1. *See Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 540-42 (1972) (holding that "[t]he present restrictions in the interstate . . . tariffs . . . do not violate our decision in *Carterfone*" and that the Commission was then "concerned with the pending and unresolved basic issues . . . whether, and to what extent, there is public need for us to go beyond what we ordered in *Carterfone*"); *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 214, 221 (1974) (noting petitioners' tariffs were "filed in compliance with our *Carterfone* ruling" and upholding the "continuing efficacy . . . of *Carterfone* and the effective tariffs on file with this Commission in implementation of *Carterfone*"), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *AT&T Proposed Tariff Revisions on Behalf of Mebane Home Telephone Co.*, 53 F.C.C.2d 473, 476 (1975) (noting that the post-*Carterfone* tariffs went beyond the actual requirements of that decision in liberalizing interconnection).

and the FCC retained the requirement of a protective connecting arrangement for unregistered equipment, explicitly acknowledging a sufficient "likelihood of harm." *Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593, 598 (1975), 67 F.C.C.2d 1255, 1272 n. 21 (1978). The FCC made no finding that the post-*Carterfone* tariffs had been unlawful or unreasonable at any earlier time.

ARGUMENT

I.

The Court Of Appeals' Holding Conflicts With The Previous Decisions Of This Court

The entire basis for the Department's assertion that the decision below is correct is its claim that no conduct can be held to be immune from the antitrust laws unless "the regulatory statute, or the regulatory agency, requires or expressly approves the precise anticompetitive conduct challenged under the antitrust laws." DOJ Br. 8. This claim is flatly inconsistent with the decisions of this Court.

A. Inconsistent Standards

First, where, as here, the specific conduct otherwise would be subject to fundamentally inconsistent legal standards, this Court has held that the conduct is impliedly immune from the antitrust laws, even when there has been neither regulatory compulsion nor regulatory approval. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975); Petition 14-20. *Gordon*, for example, is dispositive on this point. In *Gordon*, the SEC could have approved or required the fixed commission rules voluntarily adopted by the defendant securities exchanges, but it stated that it had "not approved" them and finally promulgated a rule prohibiting that practice. 422 U.S. at 675, 677.[2] Indeed,

2. *See* Brief of United States as *Amicus Curiae* at 39-41 in *Gordon v. New York Stock Exchange, supra*. Indeed, in its *amicus curiae* brief

the Justice Department in *Gordon* argued, as it has here, that there can be no immunity in the absence of regulatory compulsion or necessity, but this Court expressly rejected that argument (422 U.S. at 688):

> "We believe that the United States, as *amicus*, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity."

The Justice Department nonetheless attempts to distinguish *Gordon*. First, it argues (DOJ Br. 10) that the regulatory statute in *Gordon* was "radically different" because it referred to establishment of commission rates by the SEC, whereas the broad language of the Communications Act grants the FCC far more expansive and comprehensive powers that embrace, but are not confined to, regulating the interconnection of terminal equipment. The Department's formalistic distinction would produce interference with regulation in precisely the situations in which it is most counterproductive and unfair. This would be particularly

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there, the Department emphasized that the SEC had disclaimed it had taken any reviewable agency action between 1934 and 1975 with respect to the exchanges' rates, "much less given formal 'approval' of the rules." *Id.* at 39-40. *See also Independent Broker-Dealers' Trade Association v. SEC*, 442 F.2d 132, 137 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess., *Securities Industry Study* at 58 (Committee Print 1972) (SEC's scrutiny of the exchanges' rules "was 'at most in the nature of an interlocutory non-objection'".)

ironic because the public regulation of terminal equipment has been far more active and comprehensive than SEC regulation of commission rates and has been characterized by the imposition, by regulatory authorities, of conditions on the interconnection of terminal equipment that are inconsistent with the antitrust laws' exclusive standard of promoting competition. *Compare* page 4, n. 2, *supra*, *with* Petition 5-13.

The Justice Department's effort (DOJ Br. 10) to distinguish *Gordon* on the ground that there is nothing in the legislative history showing Congressional "awareness" that there could be restrictions on the interconnection of customer-provided terminal equipment is similarly meritless. When the Communications Act was passed in 1934, there were no entities that competed with telephone common carriers in the provision of terminal equipment due to the preexisting interconnection restrictions,[3] and Congress contemplated that telephone equipment and service would be provided solely by common carriers. *See* S. Rep. No. 781, 73d Cong., 2d Sess. at 2 (1934) (referring to "regulation of the telephone monopoly").

Finally, the Justice Department's argument (DOJ Br. 8) that *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U.S. 378 (1981), adopted the Department's current position is erroneous. This Court's holding that there was no immunity in that case was based not on the absence of regulatory compulsion or approval of the challenged conduct, but rather on the ground that the case involved "a regulatory structure quite different from those considered previously," in which "[t]here

3. Prior to the enactment of the Communications Act, numerous state statutes and decades of state regulatory decisions imposed end-to-end service responsibility on the common carriers, and those states had adopted tariffs generally prohibiting the connection of customer-provided equipment to the network. *See* Petition 6-7 and nn. 8-9. As Judge Richey recently held, those tariffs "were not merely sanctioned" by the state commissions but "were required by those agencies as being necessary for the companies to fulfill their common carrier obligations." *Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, Civil Action No. 78-0545 (D.D.C., Dec. 21, 1982), slip op. at 23 (emphasis omitted).

simply was no regulation . . . as [the state] had not established any state regulatory agency with authority to review" the challenged conduct. *Id.* at 389-90.

B. Pervasive Regulation

Second, where, as here, challenged conduct is at the heart of a pervasive scheme of public utility regulation, this Court has consistently held that the conduct is immune from antitrust liability, even in the absence of regulatory authorization or approval. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963); Petition 20-23.[4] The Department virtually ignores these authorities, except to criticize this Court's "pervasive regulation" standard. DOJ Br. 11. Its failure to address this line of cases is not surprising. When it previously unsuccessfully opposed antitrust immunity in *Gordon*, *NASD*, and similar cases, the Justice Department conceded that there should be immunity when, as here, conduct is central to "public utility regulation."[5]

4. These decisions also dispose of the Department's claims (DOJ Br. 6,9) that the combination in the Communications Act of express antitrust enforcement authority and limited express immunity for consolidations of telephone common carriers (47 U.S.C. § 221(a)) "militates especially strongly against [petitioners'] claims of implied antitrust immunity." This Court has pointedly rejected just such an argument. *Hughes Tool Co. v. Trans World Airlines, Inc., supra*, 409 U.S. at 385 n. 14. *See also* Petitioners' Reply Brief 6 and n. 5 (analyzing additional cases).

Nor does section 11(e) of the Clayton Act, 15 U.S.C. § 21(e), bar immunity in this case. Section 11(a) of the Clayton Act empowers the FCC (as well as the ICC, CAB, FRB and FTC) to enforce provisions of the Clayton Act pertaining to price discrimination, rebates, mergers, and interlocking directorships, none of which conduct is at issue in this case. Section 11(e) pertains only to orders issued in the enforcement proceedings authorized by section 11(a). *See Hughes Tool Co. v. Trans World Airlines, Inc., supra* (finding conduct subject to CAB regulation impliedly immune); *Pan American World Airways, Inc. v. United States, supra* (same).

5. *See, e.g.*, Brief for United States as *Amicus Curiae* at 16, 35 in *Gordon v. New York Stock Exchange, Inc., supra* (asserting exchanges are not entitled to immunity because they are not subject to "comprehensive, public utility-like . . . regulation"). Indeed, in its brief as

Similarly, in those decisions in which this Court has declined to find implied immunity, it has rested its holdings on the ground that there was no pervasive public utility-type regulation. For example, in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court premised its finding of no antitrust immunity on the ground that the Federal Power Act is not "a pervasive regulatory scheme for controlling the interstate distribution of power" and that Congress expressly declined to impose common carrier obligations on power companies. *Id.* at 373-74; *see also id.* at 384-87 (Stewart, J., dissenting). When conduct attacked under the Sherman Act is at the heart of a pervasive scheme of common carrier regulation, as it is here, *Otter Tail* establishes that the conduct is impliedly immune from antitrust liability.

II.

The Conflict Between The Court Of Appeals' Holding And This Court's Prior Decisions Is Most Appropriately Resolved Now

Finally, the Department contends that this case is "especially unworthy of review" because it is in an "interlocutory posture" and allegedly "premature". DOJ Br. 4, 12. The decision below, to be sure, reversed an order dismissing the case on grounds of immunity. However, this Court has frequently reviewed decisions in precisely this procedural posture, *see, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978), because the applicability of a dispositive defense is "fundamental to the further conduct of the case." R. Stern & E. Gressman, *Supreme Court Practice*, § 4.19 at 301 (5th ed. 1978). *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n. 2 (1947).

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amicus curiae in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), the Department not only distinguished the self-regulation found in the commodities trading industry under the Commodity Exchange Act from industries regulated under "pervasive regulatory schemes," but it expressly referred to the regulation of telecommunications common carriers under Title II of the Communications Act as an example of a pervasive regulatory scheme in which immunity exists. *See* Brief for United States as *Amicus Curiae* at 23 n. 11.

Review at this time is particularly appropriate here because the resolution of the conflict between the Court of Appeals' decision and the decisions of this Court would conserve judicial resources and avoid needless expense and effort not only in this case but also in the numerous similar cases now pending. Contrary to the Department's claims (DOJ Br. 12-13), the interest in terminating litigation "without having the parties invest untold efforts and vast expense in a . . . wholly irrelevant contest" is an especially important one where jurisdictional issues are raised in lengthy and complex antitrust litigation, *Hughes Tool Co. v. Trans World Airlines, Inc.*, *supra*, 409 U.S. at 390 (Burger, C.J., dissenting), and it would obviously promote the ends of orderly procedure and the overall public interest to do so here.

CONCLUSION

For the reasons stated above and in petitioners' earlier submissions, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Apeals for the Ninth Circuit.

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